United States Court of Appeals

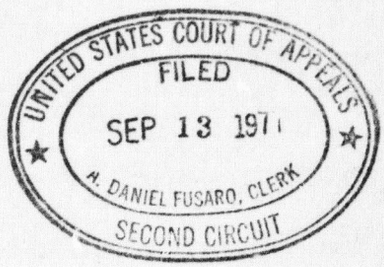
for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-7252

76-7252 7253 7254

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



CITY OF DETROIT, et al.,

v.

GRINNELL CORPORATION, et al.

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, GARDEN STATE PLAZA CORPORATION, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, Claimants,

Appellants.

On Appeal from the United States District Court
for the Southern District of New York

B P/S

PETITION OF COUNSEL FOR CLASS REPRESENTATIVES-APPELLEE FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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PETITION OF COUNSEL FOR CLASS REPRESENTATIVES-APPELLEE FOR REHEARING AND SUGGESTIONS FOR REHEARING IN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Appellee petitions for rehearing of the Court's decision of August 30, 1977, [hereinafter "Grinnell II"] annexed hereto as Appendix "A" and suggests the appropriateness of a rehearing in banc on the grounds that (1) the decision is in conflict with other cases in this Circuit as well as with the earlier decision of the Court in this very case, City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974) [hereinafter "Grinnell I"] and (2) the decision involves a question of "exceptional importance", to wit, the private enforcement of the antitrust laws through the class action device. It is respectfully submitted that the standards to be applied to fee awards to successful plaintiffs' counsel in class actions has a direct relationship on the continued vigorous private enforcement of the antitrust laws. This fact is highlighted by the sua sponte actions of the Third Circuit in Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3rd Cir. 1976) (hereinafter "Lindy II"), the second appeal in that case. Lindy II involved issues identical to those in this appeal; the Third Circuit ordered rehearing sua sponte prior to a decision by the initial three judge panel.

Despite the importance of the issues involved in the appeal sub judice, oral argument was heard and the decision was rendered by only two judges.[1/]

1/The late Mr. Justice Tom Clark was designated as a member of the Panel in Grinnell II, but never joined the Panel due to illness. His unfortunate death occurred prior to the issuance of its decision.

REASONS WHY REHEARING SHOULD BE GRANTED

A. The Decision By The Two Judge Panel Is Inconsistent With And In Effect Overrules Alpine Pharmacy, The Immediately Preceeding Relevant Decision By A Panel Of This Court.

In Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045 (2d Cir. 1973), this Court[2/] awarded attorneys' fees to plaintiffs' counsel subsequent to the settlement of antitrust class action multidistrict litigation. The decision in Grinnell II (and Grinnell I) is inconsistent and overrules Alpine Pharmacy in the following respects: (i) it does not apply the relevant standards and flexibility in fixing attorneys' fees as Alpine directs; (ii) it does not leave the matter of attorneys' fees to the "reasonable discretion" of the trial judge, but rather substitutes therefor the discretion of the two judge panel.

1. Alpine's Relevant Standards Were Not Followed:

In Alpine, the Court listed eight relevant areas of consideration[3/] in fixing attorneys' fees. In applying those considerations, the court held:

> ". . .factors such as those related above, while helpful, can serve only as guides, not as precise yardsticks. . . In the end, no mathematical formula, or precise weighing of specific factors is necessary, nor even desirable. In fact, there is no requirement that each of the listed criteria be taken into account, only that the final award be reasonable under the circumstances of the case." 481 F.2d at 1051 [Emphasis added].

2/The Panel consisted of Circuit Judges Smith, Mulligan and Timbers, with Judge Smith authoring the unanimous opinion.

3/"(1) the standing of counsel at the bar; (2) time and labor spent; (3) complexity of the litigation; (4) the amount recovered; (5) the responsibility undertaken; (6) the court's knowledge of the amount and quality of work done; (7) what it would be reasonable for counsel to charge a victorious plaintiff; and (8) whether or not counsel had the benefit of a prior decree in a Government - brought case." 48 F.2d at 1050.

The Panel in Grinnell II disregarded five of the eight criteria.[4/]

Grinnell II intentionally disregarded the "amount of recovery," stating: "Especially in class actions, judges determining fee awards should not be unduly influenced by the monetary size of the class settlement or judgment." (App. at 11). Such disregard of the benefit conferred is all the more surprising in light of the finding in Grinnell I that the settlement "was fully one hundred percent of the District Court's estimate of potential recovery, an estimate that was correctly deduced." Grinnell I, supra, 495 F.2d at 458.[5/]

Grinnell II likewise ignored "the responsibility undertaken" and "reasonable charges to a victorious plaintiff." The court refused to acknowledge that the commencement of a class action in and of itself is a substantial undertaking for any counsel, particularly since neither class counsel nor the class representative can abandon or settle the case without court approval. Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971). With respect to the "reasonable charges to a victorious plaintiff" criteria, Grinnell II refused to recognize that the named plaintiffs had agreed to pay contingent fees of at least 25%. (Original App. at 127, 132-139).

Grinnell II also ignored the District Court's knowledge of the amount and quality of work done. Rather, the Grinnell II panel attempted to review the record as submitted on appeal and make evaluations de novo. (This criteria will be discussed infra in part 2 of this Argument.)

4/In contrast, the District Court in its initial decision, considered each of the eight criteria. City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1391-1392.

5/The total fee awarded in Grinnell II ($333,073.25) was 3.33 percent of the settlement's principal, approximately 2.66 percent of the principal plus interest (approximately $12.5 million) and only 13.32 percent of the approximate interest earned (about $2.5 million).

Finally, Grinnell II misconstrued the consideration of "whether or not counsel had the benefit of a prior decree in a Government-brought case." Although in Grinnell I, the panel expressly found that the Government decree was not prima facie evidence of liability, 495 F.2d at 456, and that it was "probably adverse to the interests of those subscriber-plaintiffs. . .", Ibid, Grinnell II minimized appellee's effort as class counsel because of the extensive record created in the Government-brought action available to all plaintiffs. (App. at 17.) Inconsistently, Grinnell II chastises and penalizes appellees for not taking depositions. (App. at 5, 14) Indeed, with the voluminous record in the Government-brought action, it would have been wasteful of appellees to take needless depositions. In effect, Grinnell II appears to be penalizing appellee's efficiency rather than rewarding appellee's refusal to log unnecessary and unproductive hours.6/

In the same vein, Grinnell II penalizes appellee for having negotiated these class action settlements in only four negotiating sessions (App. at 6 and 13.) Again, appellee seems to have been penalized rather than rewarded for its skill and efficiency.7/ Would the quality of appellee's

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6/In Lindy II, supra, 540 F.2d at 114, the Third Circuit found the following concerning appellee and its co-counsel:

> ". . .Certainly, economy of effort should not be penalized. Less experienced and less skillful attorneys would undoubtedly have expended much more time in achieving the same result than did petitioners."

Grinnell II acknowledged appellee "to be experts in this field." (App. at 15.) This expertise causes the number of hours logged to be less than could be expected from less experienced counsel.

7/For example, Grinnell II notes: "The comparatively brief periods consumed in settlement negotiations must be considered in evaluating the size of assessment which a court of equity should levy on the beneficiaries." (App. at 13)

work have been greater had six or eight or ten negotiating sessions been required?

Instead of relying upon the existing precedent in this Circuit, e.g., Alpine, supra, the panel in Grinnell II relied upon decisions from other circuits; i.e., Milwaukee Towne Corp. v. Loew's Inc., 190 F.2d 561 (7th Cir. 1951), cert. denied, 342 U.S. 409 (1952); Liebman v. J.W. Petersen Coal and Oil Co., 63 F.R.D. 684 (N.D. Ill. 1974) and Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846 (8th Cir.), cert. denied, 343 U.S. 942 (1952). Both the Milwaukee Towne case and the Brookside Theatre case involved fee awards under §4 of the Clayton Act, about which Grinnell II said the following:

> ". . .we reject as having no relevant precedential value . . .antitrust cases for which §4 of the Clayton Act, 15 U.S.C. §15, expressly provides an award of counsel fees against the losing defendant." (App. at 13-14)

Accordingly, Grinnell II threw aside the existing law of this Circuit, e.g., Alpine, in order to follow cases which it labelled as "having no relevant precedential value." Moreover, both Milwaukee Towne and Brookside were decided long before Alpine, yet were not even cited by this Court in Alpine.

With Grinnell I and II standing alongside Alpine and to some extent Cranston v. Hardin, 504 F.2d 566 (2d Cir. 1974), there is substantial conflict rather than uniformity in the standards used to award attorneys' fees in successful class actions.

2. Grinnell II Wrongly Invaded The Discretion Of The Trial Judge.

In Alpine, this Court emphasized the discretion afforded the trial judge:

"Balancing these competing interests is peculiarly a job for the district court, which is the forum most familiar with the particular equities in an individual instance." Alpine, supra, 481 F.2d at 1050. [Emphasis added.]

Throughout Alpine, this Court expressed the faith it placed in the district court's familiarity and assessment of the work of petitioning counsel:

"In addition to the favorable results achieved here, we are confident that Judge Wyatt was familiar with both the quality and quantity of work done by the Committee, and with the abilities of the counsel. Under all these circumstances, we do not view the total award an abuse of discretion." Alpine, supra, 481 F.2d at 1053.

And later, the Alpine Panel held:

". . .we could hardly undertake to dispute Judge Wyatt's familiarity with the history of these actions. Given the rather ample record below, the voluminous supporting papers, and Judge Wyatt's personal involvement in much of this case, the holding of an evidentiary hearing was not necessary." Alpine, supra, 481 F.2d at 1057 [Emphasis added.]

Reliance in the trial judge was recently expressed in In the Matter of The New York, New Haven and Hartford Railroad Company, ___F.2d___, Sl. Op. 2435 (2d Cir. decided March 18, 1977), wherein Circuit Judge Anderson was presiding by designation as trial judge. In affirming Judge Anderson's awards of counsel fees under §77(c)(12) of the Bankruptcy Act, 11 U.S.C. §205(c)(12) (1970), Judge Timbers stressed the familiarity of Judge Anderson with the proceedings, that he "knew the attorneys and parties involved" and that "he was uniquely well qualified to assess their respective contributions." In Re New York, New Haven, supra, Sl. op. at 2461. See also Cranston v. Hardin, 504 F.2d 566, 578 (2d Cir. 1974) wherein the Court of Appeals accepted the district court's "high praise for the skil

and conduct" of the counsel involved without any factual support by the district court.

In contrast to the foregoing, the panel in Grinnell II rejected the findings and conclusions of Judge Metzner on the grounds that he was not specific enough:

> "But we specifically directed that the district court articulate with particularity those aspects of appellee's efforts which might lead it to increase compensation above the base rate." Grinnell II, (App. at 9.)

The panel in Grinnell II concluded: "But the court offered only a brief, rather conclusory analysis of the efforts of appellee in this litigation . . ." (App. at 13).

What the Grinnell II panel wanted and thought it did not receive was precise and specific findings by the district court, flatly contrary to the instructions of the Alpine Court:

> "In the end, no mathematical formula, or precise weighing of specific factors is necessary, nor even desirable. In fact there is no requirement that each of the listed criteria be taken into account, only that the final award be reasonable under the circumstances of the case." 481 F.2d at 1051. [Emphasis added.]

The same conclusion was reached by a panel of this court in Cranston v. Hardin, supra, wherein this Court relied upon the district court's knowledge of the history of the litigation, its familiarity with the briefs, pleadings and documents filed and the district court's conclusion as to the complexity of the matters involved. 504 F.2d at 578.

In Lindy II, supra, the Third Circuit expressly rejected these same Appellants' argument that precise findings must be made:

> ". . .we did not and do not intend that a district court, in setting an attorneys' fee, become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief." Lindy II, supra, 540 F.2d at 116 [Emphasis added.]

Compare the foregoing with the Grinnell II Panel's complaint that the district court "offers no explanation for what unusual degree of skill or atypical quality it perceived in appellee's 'General' category. . ." (App. at 13.)

The district court in Grinnell did in fact make specific findings, particularly with respect to "risk." See City of Detroit v. Grinnell Corp., 356 F. Supp., 1380, 1387-89 (S.D.N.Y. 1972). Moreover, Grinnell I made very specific findings as to risk. Grinnell I, supra, 495 F.2d at 455-459. It would have been unnecessary and wasteful for the district court to repeat those findings in its opinion on remand. Indeed, Judge Metzner referred to the earlier opinions throughout his remand opinion, 1976-1 Trade Cases, ¶60,913 (S.D.N.Y. 1976).

On remand, Judge Metzner specifically found that appellee's "work in this case demonstrated a high degree of skill" and that "the settlement was an advantageous one obtained with a high degree of legal skill."[8/] 1976-1 Trade Cases at p.68,981. Apparently, the Grinnell II panel was dissatisfied with the specificity of these findings, and rather than remand the case to Judge Metzner to fill in the alleged blanks, it looked at

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8/The settlement provision that the settlement funds, while still in the control of settling defendants, earned interest at one full percentage point above prime was an imaginative and novel approach which allowed the fund to earn interest from time to time as high as 13%. The total interest earned to date on the $10 million principal is in excess of $2.5 million. More than $9 million has already been distributed to class members.

the case de novo and made its own findings.[9/] Thus the panel in Grinnell II substituted its discretion for that of Judge Metzner and in so doing wholly ignored and demonstrated total disrespect for Judge Metzner's familiarity with the case, his knowledge of counsel and the quality of their work. The district court had a first hand opportunity to assess the quality of appellee's performance, inter alia, from pre-trial conferences, from the class action briefs and affidavits and related oral argument, from the briefs and oral argument relating to the approval of

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9/In so doing, the Panel made some clearly erroneous material findings, such as inter alia:

(i) That the "Troika" carr[ied] the laboring oar in prosecuting the suits." (App. at 5.)

This is not so. It is undisputed that no one but appellee was responsible for prosecuting the class actions. Indeed the Troika took positions adverse to the successful prosecution of the class actions. (Original App. at 1035-1036.)

The Grinnell II Panel erroneously minimized appellee's participation in the statute of limitations issues and totally ignored the significant role which appellee played in defeating the summary judgment motion. (Original App. at 1031-1034, 1044-1084.) Moreover, it totally ignored the undisputed fact that it was appellee who formulated the legal argument which eventually carried the day. (Original App. at 1032.)

(ii) That "no 'risk of litigation' factor should be considered in evaluating appellee's administrative talents." (App. at 12.)

This finding is clearly erroneous. Grinnell II completely overlooks the fact that almost all hours for administration were expended prior to the district court's approval of the settlement in December of 1972 and prior to this Court's affirming such approval in March, 1974. Had the settlement not been approved and had the classes ultimately not been certified for trial (and the district court found this to be a substantial risk, 356 F. Supp. at 1389-90), appellee would have received no compensation for that time. Likewise, no compensation would have been received if the settlements were disapproved and the cases lost at trial.

The Panel in Grinnell II erred in finding that the district court approved the settlements in early 1972. (App. at 16) The date of the opinion of approval was December 27, 1972.

the settlement, and from the affidavits and testimony of appellee at the evidentiary fee hearing. Most importantly, Judge Metzner could assess the quality of appellee's work by the result achieved, for Judge Metzner was fully aware of all of the obstacles in the way of success. All this was erroneously disregarded by the Grinnell II Panel.

B. The Grinnell II Decision Conflicts In Fact And Law With Grinnell I.

It is settled under the "law of the case" doctrine that what was decided on a former appeal is controlling on the appellate court in a subsequent appeal of the same case, Kable v. U.S., 175 F.2d 16, 18 (2d Cir. 1949), unless upon re-examination, the latter panel is convinced that the first decision was wrong. Perrone v. Pennsylvania R. Co., 143 F.2d 168 (2d Cir. 1944). In Grinnell I, specific findings of fact were affirmed and certain legal principles were enunciated, yet the decision in Grinnell II makes findings completely contrary to Grinnell I.

1. Grinnell I Found "Considerable Risk"; Grinnell II Found "No Substantial Risk".

With respect to "risk," Grinnell I found:

(a) that the findings in the Government-brought case were of "dubious value to the class plaintiffs" (495 F.2d at 455); that in fact they were "probably adverse to the interests of these subscriber-plaintiffs," id. at 456; and that defendants "might well carry the day in any new airing of that [monopolization] issue." Ibid.

(b) ". . .there would have been a serious question as to whether these actions could have been maintained as class actions at all." Id. at 457.

(c) ". . .several substantial roadblocks stand in the way of any ultimate victory for plaintiffs on the merits."

(d) "Here, plaintiffs have settled in order to avoid the considerable risks that they would not be able to recover at all." Id. at 459. [Emphasis added.]

Despite these conclusions in Grinnell I, the Grinnell II Panel summarily concluded: "As for the so-called 'risk factor,' appellee could not have been in suspense for any appreciable length of time." (App. at 16.) Compare this conclusion to that in Grinnell I:

> "The settlement in the case at hand was not negotiated in the early stages of the dispute. Here, all the parties had been able to assess the risks of success after almost four years of litigation." 495 F.2d at 465. [Emphasis added.]

2. Grinnell I Acknowledged An Increase In The Basic Rate Due To The Contingency Element; Grinnell II Refused To Recognize Such An Increase.

In remanding the fee award to the district court, Grinnell I recognized:

> "'. . .No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. . .' Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (D. Mass. 1963)." Grinnell I, supra, 495 F.2d at 470.

Grinnell I continued:

> "Perhaps the foremost of these factors is the attorneys' 'risk of litigation,' i.e., the fact that despite the most vigorous and competent of efforts, success is never guaranteed." 495 F.2d at 471.

Yet in Grinnell II, the Panel disregarded the contingency and disregarded

the risk factor which Grinnell I called the "foremost factor" to be considered after hours expended and normal hourly rates.

In so ignoring the clear findings of Grinnell I, the Grinnell II Panel awarded a fee based solely upon time expended multiplied by normal hourly rates[10/] (App. at 19), a fee which totally ignored the contingent nature of the work, the substantial risks involved, the result achieved, the quality of the work performed, and the inordinate delay (9 years) in receiving any compensation whatsoever. In so doing, Grinnell II clearly erred in not following the law of the case.

C. The Standards Enunciated In Grinnell I And Applied In Grinnell II Will Have A Chilling Effect On The Private Enforcement Of The Antitrust Laws Through Class Actions.

Despite the fact that "considerable risks" were involved, despite the fact that the recovery was "one hundred percent of the District Court's estimate of potential damages," despite the fact that settlement was not finally approved until after 5-1/2 years of litigation, despite the fact that appellee was in the Court of Appeals twice with respect to the merits and twice with respect to appellee's counsel fee, and despite the fact that appellee began these cases nine (9) years ago (July, 1968), settled them six (6) years ago and has yet to receive one penny of counsel fee, Grinnell II awarded appellee straight hourly rates, the same as if appellee

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10/ Grinnell II seems to treat the basic hourly rates which the district court applied to appellee as already containing a premium, which treatment was clearly erroneous. The district court described those rates as "reasonable hourly rate[s] for the attorneys who worked on the case, taking into account the periods of time when the services were rendered. . ." 1976-1 Trade Cases, §60,913 at p.68,982. The district court then increased those rates to reflect its findings of "risk" and "quality of work."

had been paid its normal hourly rate on a current basis, with no risk involved and where payment is not contingent upon success.[11/] The Grinnell II result will clearly have a chilling effect on class representation by able and experienced antitrust lawyers.

In Alpine, supra, the Court carefully recognized:

> "On the other hand, few would dispute the basic proposition that one whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of the antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. [Citations omitted.] In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants when taken separately, often hardly justify the expense of litigation." 481 F.2d at 1050. [Emphasis added.]

Yet despite the vital purpose enunciated in Alpine, the Grinnell II Panel weakly and ambiguously states:

> "There may be class actions where increased compensation is justified. A long and complicated trial would be an example." (App. at 15.)

Grinnell II clearly appears to penalize an efficient and expeditious successful resolution of complex litigation. It is in the interests of justice and efficient court administration for such results to be rewarded rather than penalized. Yet Grinnell II discourages efficiency; it seems

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11/During that nine (9) year period when appellee received no fees, appellee had to pay attorney, paralegal and secretary salaries plus other substantial office overhead. Thus not only did appellee not have the use of fees in the Grinnell litigation, but had to apply other monies [sometimes borrowed at interest] which otherwise could have been invested to finance its overhead for the Grinnell litigation. Add in the rampant inflation factor over the last nine (9) years and it becomes apparent that straight hourly rate compensation is not adequate, fair and reasonable under these circumstances.

by contrast to encourage "long and complicated trial[s]."[12/]

To support its conclusion, the Grinnell II Panel had to disregard the findings of Grinnell I, disregard the findings of the trial judge who presided over the cases throughout, and had to selectively sift through the record for support, often erroneously stating the facts, passing on credibility, omitting material facts, all with the purpose of downplaying appellee's role as the sole champion of these class actions and the sole creator of the fund. The result is not only inequitable in the present case, but is contrary to public policy in that it will ultimately discourage the private enforcement of the antitrust laws through class actions.

CONCLUSION

For all of the foregoing reasons, appellee respectfully petitions for rehearing and suggests a rehearing in banc, in order to create uniformity in the standards under which successful[13/] attorneys representing class

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12/Appellee respectfully submits that this will be the practical result of Grinnell II, which result the Panel most likely did not intend. What should be discouraged is unnecessarily drawn out litigation by inexperienced counsel; what should be encouraged is the efficient and expeditious prosecution of important public interest litigation by experienced counsel, such as was accomplished in the cases sub judice.

13/Not to be forgotten, unsuccessful class action attorneys -- it is undisputed -- receive no compensation. This factor was recognized but rejected by the Grinnell II Panel. (App. at 16.)

representatives in class antitrust actions will be awarded attorneys' fees under the "equitable fund" doctrine.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 316, 1202, 1203—September Term, 1976.

(Argued April 13, 1977 Decided August 30, 1977.)

Docket Nos. 76-7252, 76-7253, 76-7254

CITY OF DETROIT, et al.,

v.

GRINNELL CORPORATION, et al.,

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY,

Claimants-Appellants.

Before:

CLARK,* *Associate Justice;* and
MOORE and MULLIGAN, *Circuit Judges.*

Appeal by class members-claimants from an award of attorneys' fees entered by the United States District Court for the Southern District of New York, the Honorable

* Honorable Tom C. Clark, Associate Justice, United States Supreme Court, Retired, sitting by designation.

Mr. Justice Clark died on June 13, 1977, before this case could be decided. Pursuant to §0.14 of the Rules of this Court, this appeal is being determined by Judges Moore and Mulligan, who are in agreement.

Charles M. Metzner, *Judge*, on remand, *see* 495 F.2d 448 (2d Cir. 1974).

Affirmed in part and reversed in part.

GORDON B. SPIVACK, Esq., New York, N.Y. (Lord, Day & Lord, Herbert Brownell, Thomas D. Brislin; and David Berger, P.A., Philadelphia, Pennsylvania, David Berger and H. Laddie Montague, Jr., of counsel), *for Class Representatives-Appellee.*

ROBERT HEBDA, Esq., Washington, D.C. (Howrey & Simon, William Simon and G. Joseph King, of counsel), *for Class Members-Appellants.*

MOORE, *Circuit Judge:*

This is the second appeal taken by class members-claimants Bay Fair Shopping Center, *et al.* ("appellants") from an award of counsel fees to David Berger, Esq. and his law firm, David Berger, P.A. ("appellee").[1] The fees were awarded for work appellee performed in obtaining a common settlement fund for three national classes of plaintiffs in a suit brought against the Grinnell Corporation, *et al.* In the first appeal, *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) *("Grinnell I")*, this Court reversed as excessive an initial fee award to appellee of $1.5 million out of the settlement fund of approximately $10 million. On remand, after a hearing, the district court awarded appellee counsel fees of $870,607.00 plus disbursements of $53,267.00 for employment of paraprofessionals and $27,-

1 As used herein, the term "appellee" refers, either individually or collectively, to those lawyers of the firm David Berger, P.A.

505.00 for employment of accountants.[2] 1976-1 Trade Cases ¶60,913.

I.

The evolution of the litigation from which this appeal arises has previously been presented in detail by both the district court and this court. *See City of Detroit* v. *Grinnell Corp.*, 356 F.Supp. 1380 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 495 F.2d 448 (2d Cir. 1974).

In 1961, the Government brought an injunctive action against Grinnell Corporation and several of its subsidiaries ("defendants"). The subsidiaries were in the business of providing "central station protection services" which monitored the premises of subscribers to guard against loss by burglary or fire. The Government's case was directed primarily to monopoly charges under §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and was supported by evidence of predatory pricing in cities where the defendants encountered competition. On the basis of documentary evidence, the district court filed an opinion finding violations of both §1 and §2. *United States* v. *Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964). In 1966, the Supreme Court affirmed the district court in part, reversed in part, and remanded for hearings on relief. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). After over a year of further documentation, the district court entered a final decree on July 11, 1967.

Promptly following the Government's success, a number of the defendants' competitors and subscribers filed a host of private actions seeking treble damages for alleged predatory pricing. Over 80 private cases were eventually filed. The possibility of a suit against the defendants apparently came to the attention of Mr. Newberg, a lawyer

2 Appellants are not appealing the reimbursement of appellee for costs in connection with the employment of paraprofessionals and accountants.

working with Mr. Berger, in November of 1967, when he learned at a Harvard Law School function that a friend represented plaintiffs against "the manufacturers of burglar alarms who are charged with antitrust violations". Mr. Newberg asked his friend to send him a copy of the complaint already filed in *Allied Stores Corporation* v. *Grinnell Corporation, et al.*, for Mr. Newberg suspected that his law firm might have clients "who may have claims" of a similar nature. App. at 1128. He promptly received a copy of the filed complaint and was advised that discovery had already been instituted and that a conference between plaintiffs' and defendants' counsel was scheduled for the near future. App. at 1129.

Thereafter, three class actions were brought in the Eastern District of Pennsylvania by appellee: *City of Detroit* v. *Grinnell*, 68 Civ. 4026, was brought on behalf of a "government class"; *1225 Vine Street Building* v. *Grinnell*, 68 Civ. 4027, on behalf of a "commercial class"; and *Manhattan-Ward, Inc.* v. *Grinnell*, 68 Civ. 4028, for an "industrial class". These class actions were filed on July 10 and 11, 1968, exactly one year after the final judgment in the Government's action, and after the filing of most of the other private suits. The Judicial Panel on Multidistrict Litigation transferred all of the private actions to the Southern District of New York for consolidation and pretrial coordination. *In re Protection Devices*, 295 F. Supp. 39 (J.P.M.D.L. 1968). All suits came under the aegis of Judge Charles M. Metzner.

In their complaints, the plaintiffs represented by appellee alleged violations of the Sherman Act as the United States had charged in its civil action against the defendants.[3] Moreover, the "findings of fact, conclusions of

3 Paragraph 58 of the complaints alleged in part: "Such allegations [as had been brought by the Government] are similarly alleged in this complaint." App. at 43.

law and final judgment" in the Government's action were expressly "incorporated . . . by reference" into the class complaints. App. at 43. Attached to the complaints was a copy of the final decree filed against the defendants on July 11, 1967.

To facilitate the handling of so many cases, Judge Metzner designated three firms, referred to collectively as the "Troika", to carry the laboring oar in prosecuting the suits. As the Court said: "The purpose for creating the Troika was to have a uniform discovery application". App. at 845. Appellee was never a member of the Troika. Apart from the Troika, a Steering Committee for subscriber plaintiffs was formed, to which Mr. Berger requested, on November 5, 1968, that his name be added. Mr. Berger also requested membership on the Steering Committee's Subcommittee on Discovery. App. at 1038. To this a member of one of the Troika firms replied that he was "sure those members of the Discovery Subcommittee with whom you will be serving will be delighted to have your services". App. at 1040.

On April 17, 1969, a memorandum from Mr. Newberg to Mr. Berger advised him that at a meeting of all plaintiffs' counsel in New York on April 16, 1969, "it was decided that since we have the benefit of a governmental trial, discovery should be kept to a simple level and an early trial date should be sought". App. at 1041. Thereafter, Mr. Newberg revised a draft of a motion for an order for production of documents and invited comments from the discovery subcommittee. App. at 1042. Appellee has characterized the motion as the "singularly most important and significant discovery tool in these cases". App. at 1004. Appellee did not take any depositions, and Mr. Berger did not himself visit the document depository, though others in his firm did. App. at 845-46.

Appellee helped to draft a response to a motion by defendants for partial summary judgment on grounds of the statute of limitations. That issue was later decided against the defendants in a decision affirmed by this Court. *Russ Togs, Inc.* v. *Grinnell Corp.*, 304 F.Supp. 279 (S.D.N.Y. 1969), *aff'd* 426 F.2d 850 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970). Appellee stresses the importance of this statute of limitations victory and his prominent role in achieving it. Yet the initial draft of the brief in the Court of Appeals was prepared, pursuant to agreement, by Mr. Hoffman, counsel for a competitor plaintiff. Appellee had previously informed a member of the Troika that he wished to assist in the preparation of the appellate brief, and he did collaborate in preparing the final version. App. at 1032. The brief was formally filed by a member of the Troika. App. at 1074. Although the appeal was argued principally by Mr. Hoffman, Mr. Berger, having requested fifteen minutes time from the Court, did appear and argue.

In 1969, appellee moved to have the three national classes certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. Oral argument was heard on June 18, 1971, with appellee presenting the case for certification.

Settlement negotiations between defendants and the national claimants had been instituted in early 1970. No progress was made, however, until immediately after oral argument on the certification issue. At that time, defendants offered to negotiate a settlement agreement which, after only four bargaining sessions, was concluded by a $10 million-plus-interest settlement fund for the three classes. The settlement was dated August 27, 1971, and was approved by the district court on December 27, 1972. Appellee was given responsibility for its administration.

Appellee had filed a petition, with supporting affidavits and a memorandum of law, for an attorneys' fee of $2.5 mil-

lion plus disbursements. App. at 101-220. After a hearing at which appellants' request to present evidence was denied, the district court awarded appellee $1.5 million, or approximately 15 percent of the entire fund. *City of Detroit* v. *Grinnell Corp.*, 356 F.Supp. 1380 (S.D.N.Y. 1972).

A number of members of the represented classes appealed that award, which this court reversed in the same decision that approved the settlement. *Grinnell I*, 495 F.2d 448 (2d Cir. 1974). The award was overturned as "excessive", displaying "too much reliance upon the contingent fee syndrome", and because the district court failed to hold an adequate evidentiary hearing for the determination of the fee. The case was remanded for the fixing of a fair and adequate fee, to be determined with a "jealous regard" for the rights of claimants to the settlement fund. 495 F.2d at 468-69.

On remand, on November 10, 1975, the district court held a hearing at which appellee offered testimony of three of its attorneys, whose direct testimony consisted of affirming as true the contents of affidavits verified by them and stating the work done on the cases, as well as documentary evidence, some of "reconstructed" time claims, in support of its request for counsel fees totaling approximately $1,248,000. In an opinion dated April 21 and supplemented on April 26, 1976, the district court awarded appellee fees of $870,607.00 plus costs for paraprofessionals and accountants. The district judge first determined the number of hours expended by each attorney on several relevant types of activities. Where possible, these findings were based upon contemporaneous time records, and where such records were unavailable, the court relied upon "reconstructions", or estimates, of time amounts. The court then assigned specific hourly rates to each of appellee's attorneys based on their experience and reputation. The result-

ing basic fee, often termed the "lodestar" figure, amounted to $352,765.75. The court then adjusted this award upward to $870,607.00, an increase of almost 150 percent, by doubling and tripling the fee for various categories of effort, on the basis of subjective evaluations of the "risk" of the litigation and the legal skills displayed by appellee. 1976-1 Trade Cases ¶60,913.

II.

Appellee was rewarded for its services pursuant to the long-established equitable fund theory, a doctrine designed to permit "fair and just allowances for expenses and counsel fees to [those] parties promoting the litigation. . . ." *Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881). The theory is that an attorney whose actions have conferred a benefit upon a given group or class of litigants may file a claim for reasonable compensation for his efforts. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939); *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885). *See generally*, 7A C. Wright & A. Miller, *Federal Practice and Procedure* §1803; Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Harv.L.Rev. 1597 (1974).

But there has been a great deal of criticism of the implementation of the equitable fund doctrine under Fed.R. Civ.P. 23, much of it justified. Courts and commentators have repeatedly warned that too little judicial regard for the interests of the benefited class can easily result in lesser recoveries for intended beneficiaries because of massive fees for enterprising attorneys. *See, e.g., Liebman* v. *J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 701 (N.D. Ill. 1974); *Free World Foreign Cars, Inc.* v. *Alfa Romeo*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972); Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv.L. Rev. 849, 922-30 (1975).

In remanding this case in *Grinnell I*, we made clear our concern about this potential distortion of the equitable fund theory. The purpose of the equitable fee award was expressly stated as the "'compensat[ion of] the attorney for the reasonable value of services benefiting the . . . claimant.'" 495 F.2d at 470, *quoting Lindy Bros. Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973). We directed the district court to begin its inquiry on remand by first calculating the basic value of appellee's services. This was to be derived by multiplying the numbers of hours expended by each attorney involved in each type of work on the case by the hourly rate normally charged for similar work by attorneys of like skill in the area. Once this base or "lodestar" rate was established, other less objective factors, such as the "risk of litigation", the complexity of the issues, and the skill of the attorneys, could be introduced to determine a final fee amount. But we specifically directed that the district court articulate with particularity those aspects of appellee's efforts which might lead it to increase compensation above the base rate. 495 F.2d at 473.

Significantly, we cautioned that

> "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in Trustees v. Greenough, *supra*, when it advised that fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund.' 105 U.S., at 536." 495 F.2d at 469.

Milwaukee Towne Corp. v. *Loew's Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952), illustrates the point. That antitrust case, tried by the court, resulted in a judgment of $1,295,878.26 plus costs. The district judge entered on attorneys' fee award of $225,000. In reversing and directing that the attorneys' fee be reduced to $75,000, the Court of Appeals explained the difficulties that it had faced in the matter of reviewing the fee:

> "We said in the beginning that the question was delicate and embarrassing and this is so not only because we recognize the ability of the attorney who rendered the services but also because of the high standing and character of the three lawyers who testified in support of the allowance. And we might also add this is so because of our respect for the ability and integrity of Judge Barnes, who fixed the allowance. Notwithstanding, the fabulous amount allowed is shocking to our sense of reason and justice." 190 F.2d at 569.

The Court also stressed the danger of failing adequately to protect the interests of the absent class members:

> "[W]e are disturbed because in our sober judgment this exorbitant allowance, if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute. More than that, the possibility that the anti-trust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant and unreasonable attorney fees." 190 F.2d at 570.

Grinnell I emphasized that district courts should place primary reliance on the value of the time actually expended by fee applicants as determined by normal billing

rates. Even when making allowance for such subjective factors as the "risk of litigation", the courts must be mindful that an attorney will receive an otherwise reasonable compensation for his time from the lodestar figure alone. Especially in class actions, judges determining fee awards should not be unduly influenced by the monetary size of the class settlement or judgment; a large settlement can as much reflect the number of potential class members or the scope of a defendant's past acts as it can indicate the prestige, skill, and vigor of the class's counsel. Indeed, *Grinnell I* recognized that its effect would be to "minimiz[e] the important role traditionally played by the magnitude of the recovery. . . ." 495 F.2d at 471. As Judge Will stated in *Liebman* v. *J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974), in awarding attorneys' fees in a private antitrust class action after a settlement thereof:

> "We recognize . . . the desirability of encouraging the institution of actions seeking to vindicate the rights of members of a class who are unlikely or unable to do so individually. But we do not believe this should, or, in the light of an awakening sense of public services responsibility on the part of the bar, does in fact require the magnitude of financial reward which has been bestowed by some courts on successful plaintiffs' counsel." 63 F.R.D. at 697.

Henceforth, *Grinnell I* made clear, the touchstone for the fee was to be the actual effort made by the attorney to benefit the class. In making its decision, the district court was to act "as a fiduciary who must serve as a guardian of the rights of absent class members." *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975). Throughout

Grinnell I, the thrust was that the "award must be made with an eye to moderation . . . ." 495 F.2d at 470.

In several respects, the fee award here fails to conform to these principles. Thirteen hundred and fifty hours out of appellee's total of 3575 hours involved the administration of the settlement. The lodestar fee for these services, generously compensated at an average of almost $90 per hour, amounted to over $120,000. There is no evidence in the record of any special character or quality in these administrative endeavors, nor does the record reveal that appellee's services in these essentially routine procedures were in any way atypical. Moreover, investing or distributing the class fund could begin only *after* the settlement had been fully negotiated and approved by the district court, so no "risk of litigation" factor should be considered in evaluating appellee's administrative talents. And while someone must spend long hours processing consumer claims, it is widely recognized that "it is not work requiring any great amount of professional skill." *City of Philadelphia* v. *Chas. Pfizer & Co.*, 345 F.Supp. 454, 484 (S.D.N.Y. 1972).

Yet the district judge, without any explanation, more than doubled this part of the award, marking it up to approximately $240,000. The court's failure to accompany this increase with any elucidation of its purpose or its justification directly contravenes the explicit mandate of *Grinnell I* that the district court specify fully the facts warranting any modification or its lodestar determination.

The district judge also trebled, from a lodestar sum of approximately $183,000 to approximately $550,000, the award for *all* other work by appellee except its fee applications. This enormous increase was thought to be justified by the "complexity of the issues . . . the competence with which they were presented, the success achieved and, most

importantly, the risk of litigation". 1976-1 Trade Cases ¶60,913 at 68,982.

But the court offered only a brief, rather conclusory analysis of the efforts of appellee in this litigation, constituting little more than the type of "mere listing of factors" which, we pointed out in *Grinnell I*, "standing alone, can never provide meaningful guidance". 495 F.2d at 470. Indeed, the district court's opinion entirely fails to justify this vast increase with the express factual findings and firm record support which *Grinnell I* requires. For example, the court offers no explanation for what unusual degree of skill or atypical quality it perceived in appellee's "General" category to justify a trebling of that category's billings to almost $50,000. The comparatively brief periods consumed in settlement negotiations must be considered in evaluating the size of assessment which a court of equity should levy on the beneficiaries. As the Third Circuit has explained, any increase in the lodestar compensation figure

> "reflects exceptional services only; it may be considered in the nature of a bonus . . . The heavy burden of proving entitlement to such an adjustment is on the moving party." *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 118 (3rd Cir. 1976) (*en banc*).

We have reviewed the pre-settlement facts at some length in an effort to appraise properly the factors which should be considered in making an award, since it is our function to define the "fair and just allowances" dictated by *Trustees* v. *Greenough*, *supra*. In so doing, we reject as having no relevant precedential value cases involving contingent fees arranged by agreements with clients; stockholders' derivative actions; and antitrust cases for which §4 of the Clayton Act, 15 U.S.C. §15, expressly provides

an award of counsel fees against the losing defendant. Settled class actions are an entirely different category, and this case illustrates the reason.

Appellee began his efforts here with 21 clients whose total purchases from the defendants had amounted to just over $1,000,000. App. at 906. By expanding to three national class actions, however, he acquired a potential 89,000 additional "clients", though appellee and these possible claimants had never before communicated and certainly had not agreed to any fee arrangement. This client acquisition increased the potential total purchases figure to over $800,000,000, of which the purchases by the 14,000 actual claimants amounted to over $38,000,000. *See* 356 F.Supp. at 1384-85.

These three class actions do not appear to have been furthered exclusively by the ingenuity and perseverance of appellee. Mr. Berger and his firm were afforded the benefit of a complaint already filed and scores of suits arising out of the Government's prior action. As for the work performed, they did not create the interrogatories initiated by the Troika, though they did review them to make suggestions. They did not take any depositions. When the allegedly all-important statute of limitations motion came on, the record shows that the Troika took the lead in briefing, with appellee making suggestions which we assume to have been valuable. Mr. Hoffman, of a Troika firm, appears to have made the principal argument on the appeal of the denial of that motion, though appellee at his own request also argued.

Appellee initiated and concluded settlement negotiations for the classes, and we assume that, brief though they were, the negotiations were conducted with the skill of a practitioner experienced in that specialty. But we have carefully reviewed the record and cannot find any evidence

which would justify a conclusion that to this appellee—or any other attorney experienced in antitrust matters—these cases were "novel and complex". 1976-1 Trade Cases ¶60,913 at 68,981. Indeed, appellee had the benefit of past handling of many similar plaintiffs' antitrust cases; they were acknowledged, as we acknowledge them, to be experts in this field.

The facts of this case are similar to those in *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952), where the Court of Appeals affirmed a judgment gotten after a jury trial but decreased the attorneys' fee, explaining:

> "The case was an important one but it was not a pioneer but had many predecessors involving substantially the same issues. It contained no novel questions taxing the ingenuity or skill of counsel as prior cases in the same field had charted the course and procedure to be followed. In addition to this there was made available to counsel the decree and record in the [prior] case which in itself, by reason of the statute, made a prima facie case against the defendants which were parties to that action so that it was only necessary to produce evidence showing that the defendants were guilty of the same character of practices . . . and to make proof of the damages arising from such practices." 194 F.2d at 858-59.

There may be class actions where increased compensation is justified. A long and complicated trial would be an example. This was not the case here. Although the courts have a responsibility to award "fair and just allowances" to counsel, this must be done with full recognition of our position as a quasi-trustee of the fund to which the absent and unrepresented (except by the courts) claimants are entitled.

Insofar as the district court's comment that "the issues here were novel and complex" might be construed as a finding of fact, we hold that the record fails to support it and that within the purview of Fed.R.Civ. P. 52(a) it is clearly erroneous. If it is a conclusion of law, it is without factual foundation.

We reject appellee's argument that compensation should be generously granted for successful class action settlements in order to offset the costs of attorney time and effort expended on unsuccessful cases. We agree with the reasoning of *Liebman* v. *J. W. Petersen Coal & Oil Co.*, *supra:*

> "Several of plaintiffs' counsel have suggested that, because they have been involved in other class actions which were unsuccessful, they should be compensated in this action in an amount which would be in excess of normal or reasonable fees for their services in this case. This is an element of the argument that higher fees should be paid in class actions than normal to encourage counsel to bring them as private attorneys general.
>
> We have considerable doubt about the justice of charging members of one class higher fees to compensate counsel for failing to recover for another class." 63 F.R.D. at 697.

As for the so-called "risk factor", appellee could not have been in suspense for any appreciable length of time. The complaints were filed in July, 1968; settlement negotiations commenced in early 1970. By the settlement date, August 27, 1971, virtually all risk had been eliminated. With the district court's approval of the settlement, in early 1972, any risk that the defendants might not hold to the negotiated terms vanished altogether. Moreover, while the

decree which resulted from the Government's action against Grinnell may have had little effect on the instant class action, *see Grinnell I*, 495 F.2d at 455-56, the particular basis for the earlier decree would not alter the pertinent facts developed to such length in the Government action's massive record. Appellee, who had the benefit of access to the prior action's entire document repository, was definitely not "starting from scratch in this litigation". 1976-1 Trade Cases ¶60,913 at 68,981.

The district court's determination of $125 as a "reasonable hourly rate" for Mr. Berger and $100 per hour for five others reflects a conceded high degree of skill. An award in such amount is not to be bestowed upon a lawyer representing a class simply on the basis of his having earned entrance into the legal profession. This should especially be avoided when such an amount becomes the foundation for superimposing fees of double and treble the "reasonable" amount, with the result becoming quite unreasonable.

Chief Judge Gardner said in *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp., supra:*

> "We have carefully studied the entire record and briefs and can not escape the conclusion that the fees allowed to attorneys for plaintiff are excessive, and it is the duty of appellate courts to protect against 'vicarious generosity' in the matter of attorney fees." 194 F.2d at 859.

We have followed the same procedure and reach the same conclusion.

III.

The district judge also reasoned that appellee is entitled to compensation from the fund for its efforts in preparing and supporting its fee application in the district court

and on appeal. As support for this proposition, the court cited the district court opinion on remand in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 382 F.Supp. 999, 1012 (E.D. Pa. 1974). But the Third Circuit, in its *en banc* opinion in that case, has since repudiated the reasoning of the district court. *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 110-11 (3rd Cir. 1976) (*en banc*) (*"Lindy II"*). That Court of Appeals has reaffirmed the principle that fees may be taxed against the class under the equitable fund theory only for services actually conferring a benefit on the class. As the *Lindy II* opinion explained,

> "Services performed in connection with the fee application are necessary to the attorney's recovery. They benefit *him*, for without them, the attorney cannot . . . recover. But such services do not benefit *the fund*—they do not create, increase, protect, or preserve it. . . . There being no benefit to the fund from services performed by appellees in connection with their fee application, there should be no attorneys' fee award from the fund for those services." 540 F.2d at 111.

Moreover, if counsel is allowed compensation for efforts to obtain his fee, any class member objecting to an initial award would risk increasing the total attorneys' fee—and thereby decreasing the class's fund—even though successful in pressing the objection.

Finally, although we are aware of decisions in this Circuit denying attorneys' fees for work evidenced only by "reconstructed" time records, *e.g.*, *In re Hudson & Manhattan Railroad Co.*, 339 F.2d 114 (2d Cir. 1964); *In re Wal-Feld Co.*, 345 F.2d 676 (2d Cir. 1965), we concur in

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF DETROIT, et al.,

v.

GRINNELL CORPORATION, et al.

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, GARDEN STATE PLAZA CORPORATION, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY,
Claimants,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S WAIVER OF GROUNDS FOR DISQUALIFICATION PURSUANT TO 28 U.S.C. §455(e)

DAVID BERGER, P.A.,
1622 Locust Street
Philadelphia, PA 19103

Appellee

Of Counsel:
David Berger
H. Laddie Montague, Jr.

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Appellee (David Berger and David Berger, P.A., Attorneys at Law) hereby waives any grounds for disqualification of any judge of the United States Court of Appeals for the Second Circuit under 28 U.S.C. §455(a) and further submits that there is no ground for any judge of that Circuit to disqualify himself under 28 U.S.C. §455(b)(4), and in support thereof respectfully represents:

1. Certain appellants hereto (i.e., Exxon Corporation and Shell Oil Company) are among this country's largest corporations and their respective securities are widely held by the investing public, including members of the judiciary and their immediate families. Appellee has been advised that Exxon Corporation has 448,088,000 outstanding shares of common stock and that Shell Oil Company has 142,396,000 outstanding shares of common stock.

2. The outcome of these appeals will have a miniscule effect upon the financial interests of appellants and a progressively decreasing effect upon the financial interests of their respective shareholders. This is apparent from the following:

(1) APPELLANT	(2) GROSS RECOVERY 1/	(3) SHARE OF $1.5 MILLION FEE AWARD 2/	(4) SHARE OF $870,607 FEE AWARD 3/	(5) SHARE OF $333,073.25 FEE AWARD 4/
Exxon Corp.	$ 853	$ 102	$ 59	$ 30
Shell Oil Co.	10,824	1,291	746	286

1/The Gross Recovery to all class members in these class actions is $10,000,000 principal plus approximately $2,569,000 in earned interest.

2/This was the initial award of the district court in City of Detroit v. Grinnell Corp., 356 F.Supp. 1380 (S.D.N.Y. 1972) which approximates 11.93% of the Gross Recovery.

3/This was the fee awarded by the district court upon remand, 1976-1 Trade Cases, ¶60,913 (S.D.N.Y. 1976), which approximates 6.9% of the Gross Recovery.

4/This is the fee as modified by Judges Moore and Mulligan in City of Detroit v. Grinnell Corp., Nos. 76-7252, 7253, and 7254 (2d Cir. decided August 30, 1977) which approximates 2.65% of the Gross Recovery.

(1) APPELLANT	(2) GROSS RECOVERY	(3) SHARE OF $1.5 MILLION FEE AWARD	(4) SHARE OF $870,607 FEE AWARD	(5) SHARE OF $333,073.25 FEE AWARD
International Lubricant Corp.	$ 2,608	$ 311	$179	$ 69
Bay Fair Shopping Center	448	53	30	11
Friendswood Development Co.	295	35	20	7

Accordingly, each appellant has the following financial interest in the outcome of these appeals, e.g., the difference between the district court's initial award (column 3 above) and the award as modified by the Second Circuit (column 5 above):

Exxon Corporation:	$72
Shell Oil Co.:	$1,005
International Lubricant Corp.:	$242
Bay Fair Shopping Center:	$42
Friendswood Development Co.:	$28

3. Considering Exxon's 448 088,000 outstanding shares of common stock and Shell's 142,396,000 shares of common stock, Exxon's interest of $72 and Shell's interest of $1,005 in the outcome of these appeals cannot be deemed to substantially affect any of their respective shareholders' financial interest.

4. 28 U.S.C. §455(a), (b)(4) and (3) provides:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

> (b) He shall also disqualify himself in the following circumstances:
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

5. To the extent any judge of this Circuit owns securities in any appellant hereto, so that his "impartiality might reasonably be questioned", 28 U.S.C. §455(a), appellee hereby waives any ground for disqualification pursuant to 28 U.S.C. §455(e).

6. To the extent any judge of this Circuit owns securities in any appellant hereto, appellee respectfully submits that such ownership would not disqualify that judge under 28 U.S.C. §455(b)(4), since that judge's interest could not be affected by the outcome of these proceedings, let alone "substantially affected."

7. The original defendants in this litigation - Grinnell Corporation, American District Teleg. h Company, Holmes Electric Protective Company, and Automatic Fire Alarm Company - are not parties to these appeals and are not affected by the outcome in any way whatsoever.

David Berger
H. Laddie Montague, Jr.
DAVID BERGER, P.A.
1622 Locust Street
Philadelphia, PA 19103

Appellee

DATED: September 12, 1977

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No. 76-7252 7253 7254

CITY OF DETROIT, et al.,

Plaintiffs

against

GRINNELL CORPORATION, et al.,

Defendants

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

915 - 84th Street, Brooklyn, NY 11228

That on September 13 *19* 77 *deponent served the annexed* Appellee's Waiver Of Grounds For Disqualification Pursuant to 28 U.S.C. §455(e) and Petition Of Counsel For Class Representatives-Appellee For Rehearing And Suggestion For Rehearing En Banc

on attorney(s) for Howrey, Simon, Baker & Murchison
Appellants

in this action at 1730 Pennsylvania Avenue, Washington, D.C. 20006

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~a post office~~ an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
13th day of September, 1977.

Frances M. Malazdra

FRANCES M. MALAZDRA
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-2485760
Qualified in Nassau County
Cert. Filed in N. Y. & Nassau Co.
Commission Expires March 30, 1979

Kathleen Anderson

The name signed must be printed beneath

CATHLEEN ANDERSON

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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13th day of September, 1977.

Frances M. Malazdra

FRANCES M. MALAZDRA
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-24-~~7~~ 0
Qualified in ~~Kings~~ County
Cert. Filed in N. Y. & Nassau Co.
Commission Expires March 30, 1979

Kathleen Anderson

The name signed must be printed beneath

CATHLEEN ANDERSON

Judge Metzner's holding that "the hours allocated for the periods that were not covered by time records are fair and reasonable." 1976-1 Trade Cases ¶60,913 at 68,981. In September, 1970, Messrs. Berger, Montague, and Newberg left the firm of Cohen, Shapiro, Berger, Polisher and Cohen to form their own firm. In setting up a new office there inevitably was some confusion which militated against the keeping of complete time records for each case handled. However, it is obvious that some work, of necessity, must have been performed on the *Grinnell* cases during this period. Lengthy affidavits submitted to the district court detailed how the time in fact expended was conservatively reconstructed by reference to pleading files, the time records of other attorneys, and other contemporaneous documents. Indeed, the careful reconstruction in this case contrasts sharply with the "almost entirely unsupported" estimates in *In re Hudson & Manhattan Railroad Co., supra,* at 115. Accordingly, we allow compensation for reconstructed time in this case.

We therefore affirm the "reasonable hourly rate for the attorneys who worked on this case" as found by Judge Metzner. 1976-1 Trade Cases ¶60,913 at 68,982. We likewise approve an award of compensation for each of the categories of effort listed by the district court, except for that of "Fee Application". We reverse the allowance of any compensation for fee applications, original or appellate, and reverse the doubling and trebling of the categories so treated. In short, we hold that appellee should derive a total fee of $333,073.25, *i.e.* $352,765.75 minus $19,692.50, and direct that a judgment awarding such fee be entered.